

No. 16-345

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**In the Supreme Court of the United States**

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CHARLES GUGLIUZZA, PETITIONER

*v.*

FEDERAL TRADE COMMISSION

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT*

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**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Whether Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), authorized the district court to hold petitioner jointly and severally liable with his co-defendants for the total amount of the defendants' illicit gains, where the effect of that order was to hold petitioner liable for a restitution amount greater than the gains that he personally had received.

2. Whether the Seventh Amendment gives a defendant the right to demand a jury trial when a district court, in exercising its equitable powers, requires the defendant to pay restitution in excess of the individual's own illicit gains.

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1-21) is reported at 815 F.3d 593. An accompanying memorandum decision of the court of appeals is not published in the *Federal Register* but is reprinted at 642 Fed. Appx. 680. The opinion of the district court (Pet. App. 22-113) is reported at 878 F. Supp. 2d 1048.

**JURISDICTION**

The judgment of the court of appeals was entered on March 3, 2016. A petition for rehearing was denied on May 16, 2016 (Pet. App. 114-115). On July 12, 2016, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including September 13, 2016, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Section 5 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 41 *et seq.*, makes it unlawful to use “unfair or deceptive acts or practices in or affecting commerce,” 15 U.S.C. 45(a)(1), and “empower[s] and direct[s]” the Federal Trade Commission (FTC or Commission) to prevent such practices, 15 U.S.C. 45(a)(2). A principal mechanism for FTC enforcement of Section 5 is the filing of suits in federal district courts pursuant to Section 13(b) of the FTC Act, 15 U.S.C. 53(b). That provision states that, “[w]henver the Commission has reason to believe \* \* \* that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by” the Commission, it may file suit to “enjoin any such” violation. *Ibid.* Section 13(b) further provides that “the Commission may seek, and after proper proof, the court may issue, a permanent injunction.” *Ibid.*

This case involves an illegal scheme to sell a website-hosting service using deceptive marketing practices that induced consumers to sign up for a monthly-fee service without adequately disclosing to consumers the true nature of the arrangement. Pet. App. 3-4. Commerce Planet, Inc. purported to sell a website-hosting service (OnlineSupplier) that would enable customers to sell products online. *Id.* at 3. Consumers who signed up for OnlineSupplier were charged a monthly service fee that ranged over time from \$29.95 to \$59.95. *Ibid.* Commerce Planet sold OnlineSupplier through the internet. The webpage to which it directed consumers, however, did not mention OnlineSupplier and instead offered potential customers a free “Online Auction Starter Kit” that explained how customers could sell products on eBay.

*Id.* at 3-4. A consumer could obtain a starter kit by providing a home address and valid credit card number to pay for shipping and handling costs. *Id.* at 4.

In so doing, however, consumers agreed to purchase OnlineSupplier through a “negative option” that provided the service to customers at no charge for a 14-day trial period. Pet. App. 4. If a consumer did not take the requisite affirmative steps to cancel the membership within that timeframe, the company automatically charged the consumer’s credit card for the recurring monthly membership fee. *Ibid.* Because the negative-option provision was buried in fine print, many consumers did not realize that ordering the free starter kit also constituted an agreement to purchase OnlineSupplier, and they first learned of that condition when their credit cards were charged for the monthly subscription fee. *Ibid.*

For more than two years, petitioner exercised operational control over Commerce Planet, first as a consultant and then as the company’s president. Pet. App. 4. Throughout that period, petitioner oversaw and directed the company’s marketing of OnlineSupplier, including by reviewing and approving the manner in which the negative option was disclosed to consumers. *Id.* at 4-5, 33-41.

2. In 2009, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. 53(b), the Commission filed this civil enforcement action against petitioner, Commerce Planet, and two other individuals involved with the company. Pet. App. 41. The Commission alleged that the company had engaged in deceptive marketing acts and practices, in violation of the FTC Act, and it sought a permanent injunction against those acts and



practices. *Id.* at 2, 6, 22-24. Petitioner's co-defendants settled their cases, and petitioner elected to stand trial. *Id.* at 2.

After a 16-day bench trial, the district court held that the company's marketing practices violated Section 5(a) of the FTC Act, 15 U.S.C. 45(a). Pet. App. 2, 42-80. The court also determined that petitioner could be held personally liable for the company's unlawful conduct because petitioner had participated in and had authority to control the deceptive practices, and because he had knowledge of the wrongful acts. *Id.* at 80-91.

The district court relied on evidence establishing that more than 500,000 consumers had ordered the purportedly free kit during the relevant time period. Pet. App. 33. Each month, Commerce Planet had received thousands of complaints from consumers who believed they had signed up to receive the free kit only and had not intended to subscribe to the monthly service. *Id.* at 67-69. Although petitioner had been repeatedly made aware of the complaints, *id.* at 87-89, he had "explicitly rejected suggested improvements to the disclosures," and he had "quickly jettisoned the few improvements that were implemented \* \* \* because they 'were a disaster' to" OnlineSupplier's enrollment figures, 642 Fed. Appx. at 683 (court of appeals decision rejecting petitioner's challenges to the district court's liability ruling). When the company's attorney expressed concern that the webpages did not comply with the FTC Act, petitioner "put his hands over his ears, and refused to discuss the matter further." *Ibid.* Petitioner and his company ultimately collected more than \$36 million in monthly subscription fees from consumers. Pet. App. 19, 111.

Pursuant to its authority under Section 13(b) of the FTC Act, 15 U.S.C. 53(b), the district court permanently enjoined petitioner from engaging in similar misconduct and ordered him to pay \$18.2 million in equitable restitution. Pet. App. 96-113. Although the Commission had sought restitution of \$36.4 million—the total amount collected from consumers through petitioner’s misleading practices—the court declined to award that amount, crediting petitioner’s argument that not all consumers were actually deceived. *Id.* at 109-113. The court found that “[t]he evidence strongly supports the conclusion that most reasonable consumers would have been misled by OnlineSupplier’s landing and billing pages,” and it determined that a “conservative floor” for calculating the restitution amount was “that at least 50% of consumers who ordered OnlineSupplier were misled by the sign-up pages.” *Id.* at 111-112.

3. The court of appeals affirmed. Pet. App. 1-21 (affirming restitution award); see 642 Fed. Appx. at 680 (affirming liability finding).

As relevant here, the court of appeals rejected petitioner’s argument that the district court lacked power under Section 13(b) of the FTC Act, 15 U.S.C. 53(b), to award any restitution because a court’s authority under that provision is limited to injunctive relief. Pet. App. 6-9. The court of appeals relied on this Court’s decision in *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), in holding that Section 13(b)’s authorization of injunctive relief invokes a district court’s equity jurisdiction, “which carries with it ‘all the inherent equitable powers of the District Court.’” Pet. App. 7 (quoting *Porter*, 328 U.S. at 398). The court of appeals explained that a district court’s “equitable

powers are comprehensive” and, “especially \* \* \* in cases involving the public interests,” a court’s “equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.” *Ibid.* (quoting *Porter*, 328 U.S. at 398). The court of appeals concluded that here, as in *Porter*, the district court’s equitable authority under Section 13(b) includes the power to order restitution. *Id.* at 7-8; see *Porter*, 328 U.S. at 399 (“Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief.”).

The court of appeals also rejected petitioner’s contention that the district court had exceeded its authority under Section 13(b) when it awarded restitution in excess of petitioner’s own gain from the unlawful scheme. Pet. App. 9-17. The court of appeals recognized that restitution “involve[s] the return to the plaintiff of gains a defendant has unjustly received.” *Id.* at 9 (citing Restatement (Third) of Restitution and Unjust Enrichment § 1 cmt. a (2011)). The court held, however, that an individual defendant who acts in concert with a corporate entity may be held personally liable for the corporation’s unjust gains, “provided the requirements for imposing joint and several liability are satisfied, and here they are.” *Id.* at 9-10.

The court of appeals explained that, in order for an individual to be held personally liable for corporate violations of the FTC Act, the Commission must prove both that the individual had “participated directly in, or had the authority to control, the unlawful acts or practices at issue,” and that he “had actual knowledge of the misrepresentations involved, was recklessly

indifferent to the truth or falsity of the misrepresentations, or was aware of a high probability of fraud and intentionally avoided learning the truth.” Pet. App. 10. The court further explained that, if the FTC makes that showing, a district court may hold the individual jointly and severally liable for the corporation’s restitution obligations. *Ibid.* Finding those requirements satisfied here, the court of appeals held that petitioner’s culpability for the corporate violations “establishes the degree of collaboration between co-defendants necessary to justify joint and several liability.” *Ibid.*

The court of appeals rejected petitioner’s argument that only courts of law have authority to impose joint-and-several liability. The court noted that “[e]quity courts have long exercised the power to impose joint and several liability” in, for example, cases involving breach of the duties imposed by trust law. Pet. App. 11. The court also rejected petitioner’s argument that this Court’s decision in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) (*Great-West*), requires courts in Section 13(b) actions to distinguish between “legal” restitution and “equitable” restitution. Pet. App. 12-13; see *id.* at 12-15. The court of appeals explained that this Court in *Great-West* faced “interpretive constraints” that were specific to the provision of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, at issue there and are “wholly absent here.” Pet. App. 14.

The court of appeals rejected petitioner’s contention (asserted for the first time on appeal) that he was entitled to a jury trial because the district court had awarded “‘legal’ restitution.” Pet. App. 15; see *id.* at

15-17. The court of appeals explained that this Court “has consistently stated that restitution is an equitable remedy for Seventh Amendment purposes, without drawing any distinction between the legal and equitable forms of that relief.” *Id.* at 15. The court held that, “so long as a court limits an award under § 13(b) to restitutionary relief, the remedy is an equitable one for Seventh Amendment purposes and thus confers no right to a jury trial.” *Id.* at 16.

Having explained that the imposition of joint-and-several liability would be permissible in this case, the court of appeals acknowledged that “the judgment entered against [petitioner] does not actually hold him jointly and severally liable for Commerce Planet’s restitution obligations.” Pet. App. 16. To verify that this was in fact the district court’s intent, the court of appeals remanded for clarification of that point. *Id.* at 16-17. On remand, the district court clarified that petitioner’s liability to pay restitution was joint and several with that of his co-defendants, and that petitioner’s liability must be offset by any amounts collected from them. D. Ct. Doc. 331, at 9-10 (Aug. 25, 2016).

Finally, the court of appeals upheld the district court’s determination “that Commerce Planet’s unjust gains totaled \$18.2 million.” Pet. App. 17; see *id.* at 17-21. The court explained that, “[u]nder the first step” of the governing analytic framework, “the FTC bears the burden of proving that the amount it seeks in restitution reasonably approximates the defendant’s unjust gains.” *Id.* at 17. The court observed that unjust gains in a Section 13(b) case are not “measured by the consumers’ total losses” because “that would amount to an award of damages, a remedy available

under [15 U.S.C. 57b(b)] but precluded under § 13(b).” Pet. App. 18. The court further explained that, “[i]f the FTC makes the required threshold showing, the burden then shifts to the defendant to show that the FTC’s figures overstate the amount of the defendant’s unjust gains.” *Ibid.* The court concluded that “[t]he FTC carried its initial burden at step one,” *id.* at 19, and that petitioner had failed to show that the \$18.2 million figure was excessive, *id.* at 19-21.

#### ARGUMENT

Petitioner argues (Pet. 13-28) that the district court’s restitution award was not authorized by Section 13(b) of the FTC Act, 15 U.S.C. 53(b); that the award was not equitable in nature; and that it triggered his Seventh Amendment right to a jury trial. The court of appeals correctly rejected petitioners’ arguments, and its decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Section 13(b) of the FTC Act, 15 U.S.C. 53(b), authorizes a district court to “issue[] a permanent injunction” against any act or practice found to violate a law that the FTC enforces. Such laws include Section 5 of the FTC Act, 15 U.S.C. 45, which makes it unlawful to use “unfair or deceptive acts or practices in or affecting commerce,” 15 U.S.C. 45(a)(1), and “empower[s] and direct[s]” the FTC to prevent such practices, 15 U.S.C. 45(a)(2). The court of appeals held that the statutory authority to enter “a permanent injunction” “also empowers district courts to grant ‘any ancillary relief necessary to accomplish complete justice,’ including restitution.” Pet. App. 6 (quoting *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102

(9th Cir. 1994), cert. denied, 514 U.S. 1088 (1995)); see *id.* at 6-8.

Petitioner does not dispute the general proposition that the district court in a Section 13(b) case may order restitution as relief ancillary to a permanent injunction. Petitioner argues (Pet. 13-22), however, that the district court erred in ordering restitution in an amount greater than petitioner's own gains from his unlawful conduct. Petitioner is incorrect.

a. Petitioner contends (Pet. 13-22) that the district court in this case improperly measured the restitution amount by the estimated loss to consumers rather than by petitioner's own illicit gains, and that the court of appeals' decision approving that award conflicts with decisions of this Court and of the Second and Eleventh Circuits. That argument reflects a misunderstanding of the court of appeals' analysis.

The court of appeals recognized that, in a Section 13(b) case, the amount of restitution must be tied to the illicit gains of the defendants rather than to the victims' losses. Pet. App. 17-18; accord, *FTC v. Washington Data Res., Inc.*, 704 F.3d 1323, 1326 (11th Cir. 2013); *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 66-67 (2d Cir. 2006), cert. denied, 549 U.S. 1278 (2007). To be sure, the court observed that “[i]n many cases \* \* \* the defendant's unjust gain ‘will be equal to the consumer's loss because the consumer buys goods or services directly from the defendant,’” and it indicated that this equivalence existed here. Pet. App. 18 (quoting *Verity Int'l*, 443 F.3d at 68). The court of appeals recognized, however, that defendants' illicit gains and consumers' losses will “diverge” in some cases—*e.g.*, “where ‘some middleman not party to the lawsuit takes some of the consumer's money before it reaches

a defendant's hands'”—and that the gain to the defendant would be the proper measure of restitution in that circumstance. *Ibid.* (quoting *Verity*, 443 F.3d at 68); see *id.* at 17 (explaining that, under the applicable analytic framework, “the FTC bears the burden of proving that the amount it seeks in restitution approximates the defendant's unjust gains”).

The court of appeals approved the \$18.2 million restitution figure, not because that was the amount of the victimized consumers' aggregate losses, but because the court upheld as reasonable the district court's conclusion that “*Commerce Planet's unjust gains* totaled \$18.2 million.” Pet. App. 17 (emphasis added); see *id.* at 17-21. The court thus concluded that, although the \$18.2 million figure did not reflect petitioner's *own* illicit gains from the FTC Act violations, it did reflect the gains realized by his co-defendant. The court of appeals also made clear that the \$18.2 million restitution award against petitioner could stand if, but only if, the district court confirmed its intent “to hold [petitioner] jointly and severally liable with Commerce Planet.” *Id.* at 16. The district court did so on remand. See p. 8, *supra*.

Petitioner's real dispute thus is with the district court's decision to hold petitioner jointly and severally liable with Commerce Planet and the other defendants in this case. That issue is addressed at pp. 16-18, *infra*. But if the imposition of joint-and-several liability was appropriate, it is entirely clear that the courts below based the \$18.2 million restitution amount on the collective illicit gains of the defendants, not on the total losses suffered by consumers.

b. The court of appeals' decision is consistent with this Court's precedents.



i. The court below relied on this Court's decision in *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), which considered whether a district court was authorized to order restitution for a violation of the Emergency Price Control Act of 1942, 50 U.S.C. 901 *et seq.* (repealed 1956). *Porter*, 328 U.S. at 396-397. Like the FTC Act, that statute empowered a district court, in a suit filed by the authorized government enforcement agency, to issue a permanent injunction to enjoin acts and practices made illegal by the Act and to enforce compliance with the statute. *Id.* at 398. This Court held that the district court's statutory authority was "equitable" and that, "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court [were] available for the proper and complete exercise of that jurisdiction." *Ibid.*; see *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292 (1960) ("When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes."). The Court further explained that, because "the public interest [was] involved in a proceeding" under the applicable statute, "those equitable powers assume[d] an even broader and more flexible character than when only a private controversy [was] at stake," *Porter*, 328 U.S. at 398, and included the "[p]ower \* \* \* 'to do equity and to mould each decree to the necessities of the particular case,'" *ibid.* (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)).

ii. Petitioner contends (Pet. 14-16) that the district court's award of restitution in this case conflicts with this Court's decisions in *Mertens v. Hewitt Assocs.*,

508 U.S. 248 (1993), and *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002). Petitioner reads those decisions to preclude an award of restitution in an amount greater than petitioner's own gains from the illicit scheme. Petitioner's reliance on those decisions is misplaced.

In *Mertens*, the Court interpreted a provision of ERISA that authorized suits by plan beneficiaries "to enjoin any act or practice which violates \* \* \* the terms of the plan" or to obtain "other appropriate equitable relief." 508 U.S. at 253. The Court held that the phrase "other appropriate equitable relief" was limited to only "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Id.* at 253, 256. Although the Court recognized that the phrase "other appropriate equitable relief" could be read to mean "whatever relief a court of equity is empowered to provide in the particular case at issue," *ibid.*, it read the ERISA provision more narrowly because the broader interpretation "would limit the relief not at all" and therefore would "render the modifier superfluous." *Id.* at 257-258. The Court ultimately concluded that the relief sought in *Mertens* was not authorized by the statute because it constituted compensatory damages for actuarial losses caused by a breach of fiduciary duty, rather than a form of traditional equitable relief like restitution. *Id.* at 250-251, 255.

Petitioner also relies (Pet. 14-16) on *Great-West*, in which this Court construed the same ERISA provision and confirmed that the provision authorized a court to order equitable restitution. 534 U.S. at 212-214. The Court distinguished between equitable restitution,

which requires a defendant to return money or property improperly taken from a plaintiff, and legal restitution, which requires a defendant to compensate a plaintiff from whom the defendant has obtained a benefit. *Id.* at 213-214. Emphasizing the Court's holding that equitable restitution "must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession," Pet. 14-15 (quoting *Great-West*, 534 U.S. at 214) (emphasis omitted), petitioner argues (Pet. 14-16) that the district court's restitution order cannot be sustained because it ordered petitioner to pay much more than the \$3 million he received as a result of the illegal marketing practices. Petitioner is incorrect.

The ERISA provision at issue in *Mertens* and *Great-West* is materially different from the provision of the FTC Act at issue here, and from the provision of the Emergency Price Control Act that was at issue in *Porter*. The ERISA provision authorizes the award of injunctive and "other appropriate equitable relief," which the Court in *Mertens* construed as *excluding* certain types of relief (including legal restitution and some monetary damages awards) that, although legal in nature, could be awarded by courts of equity. 508 U.S. at 256-258. The Court in *Mertens* reasoned that, "[s]ince *all* relief available for breach of trust could be obtained from a court of equity, limiting the sort of relief available under [the ERISA provision at issue] to 'equitable relief' in the sense of 'whatever relief a common-law court of equity could provide in such a case' would limit the relief *not at all*." *Id.* at 257. Section 13(b) of the FTC Act provision, 15 U.S.C. 53(b), contains no similar limiting language. Rather,

like the statutory provision at issue in *Porter*, Section 13(b) of the FTC Act, 15 U.S.C. 53(b), authorizes a district court to issue a permanent injunction to enjoin acts and practices made illegal by the FTC Act and to enforce compliance with the FTC Act.

In construing the statutory provision at issue in *Porter*, this Court held that the grant of authority encompassed “all the inherent equitable powers of the District Court,” 328 U.S. at 398, including the “award [of] complete relief even though the decree includes that which might be conferred by a court of law,” *id.* at 399 (citation omitted). Thus, even if one viewed a portion of the restitution award in this case as restitution in law rather than restitution in equity, it is plainly relief that a court of equity could award in conjunction with enjoining acts or practices made illegal by a federal statute—particularly in the context of protecting the public interest. See, e.g., *Kansas v. Nebraska*, 135 S. Ct. 1042, 1053 (2015) (“When federal law is at issue and ‘the public interest is involved,’ a federal court’s ‘equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.’”) (quoting *Porter*, 328 U.S. at 398).

iii. Every court of appeals to consider the issue—seven in addition to the Ninth Circuit—has relied on the principles articulated in *Porter* to hold that the district court in a Section 13(b) case may award monetary relief, including restitution or disgorgement, as a means of awarding complete relief when a defendant has engaged in “unfair or deceptive acts or practices” in violation of 15 U.S.C. 45(a). See *FTC v. Ross*, 743 F.3d 886, 890-891 (4th Cir.), cert. denied, 135 S. Ct. 92 (2014); *FTC v. Bronson Partners, LLC*, 654 F.3d 359,

366 (2d Cir. 2011) (holding that Section 13(b) empowers district courts to grant ancillary equitable relief, including a money judgment); *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 14-15 (1st Cir. 2010) (holding that restitution is an appropriate remedy for deceptive advertising); *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005) (holding that Section 13(b) authorizes “monetary relief \* \* \* incidental to injunctive relief”); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468 (11th Cir. 1996) (holding that Section 13(b) “carries with it the full range of equitable remedies,” including monetary remedies); *Pantron I Corp.*, 33 F.3d at 1102 (9th Cir.) (holding that district courts are authorized to award restitution to correct “unjust enrichment” and “protect consumers from economic injuries”); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314-1315 (8th Cir. 1991) (Section 13(b) “empowers district courts to grant \* \* \* ancillary equitable relief” including “equitable monetary relief.”); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571 (7th Cir.) (holding that Section 13(b) includes grant of power to order ancillary equitable relief, including “rescission and restitution”), cert. denied, 493 U.S. 954 (1989).<sup>1</sup>

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<sup>1</sup> The courts of appeals have similarly upheld the authority of district courts to provide equitable monetary relief under comparable provisions of other regulatory enactments. See, e.g., *United States v. Lane Labs-USA Inc.*, 427 F.3d 219, 225-226 (3d Cir. 2005) (Federal Food, Drug, and Cosmetics Act, 21 U.S.C. 332(a)); *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989) (Securities Exchange Act of 1934, 15 U.S.C. 78m(d)); *CFTC v. Co Petro Mkt'g Grp., Inc.*, 680 F.2d 573, 583-584 (9th Cir. 1982) (Commodity Exchange Act, 7 U.S.C. 13a-1); *ICC v. B & T Transp. Co.*, 613 F.2d 1182, 1184-1186 (1st Cir. 1980) (Motor Carrier Act, 1935, 49 U.S.C. 304a (1976)).

c. Petitioner is also wrong in arguing (Pet. 20-22) that the district court lacked authority to impose joint-and-several liability on petitioner and his co-defendants for their collective illicit gains.

i. “Equity courts have long exercised the power to impose joint and several liability, most notably in cases involving breach of the duties imposed by trust law.” Pet. App. 11 (citations omitted). Petitioner does not contend that the district court lacked a basis for concluding that he had acted in concert with his co-defendants in violating the FTC Act to the detriment of consumers. Nor does he offer any factual basis for apportioning responsibility among the defendants for the collective illicit gains. In such circumstances, the imposition of joint-and-several liability is consistent with the well-established practice of equity courts. See, e.g., *Crites, Inc. v. Prudential Ins. Co.*, 322 U.S. 408, 414 (1944) (breach of receiver’s duty to estate would warrant an order to “disgorge[]” profits, “including the profits of others who knowingly joined him in pursuing an illegal course of action”); *Jackson v. Smith*, 254 U.S. 586, 589 (1921) (“[O]thers who knowingly join a fiduciary in [an illegal] enterprise likewise become jointly and severally liable with him for such profits.”) (citing cases); see also 4 John Norton Pomeroy, *A Treatise on Equity Jurisprudence as Administered in the United States of America*, § 1081, at 231-232 (5th ed. 1941).

ii. Contrary to petitioner’s contention (Pet. 21-22), the court of appeals’ affirmance of the imposition of joint-and-several liability here does not conflict with any decision of another court of appeals. Although petitioner asserts a circuit conflict, he does not identify any court of appeals decision holding that joint-and-

several liability is not appropriate in a case under Section 13(b) of the FTC Act, 15 U.S.C. 53(b). And several courts of appeals have affirmed such awards against defendants who directly participated in or controlled the commission of FTC Act violations and had knowledge of them. See, e.g., *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 619, 636-637 (6th Cir. 2014); *Ross*, 743 F.3d at 889 (4th Cir.); *Gem Merch. Corp.*, 87 F.3d at 468 (11th Cir.); *Amy Travel Serv., Inc.*, 875 F.2d at 573-575 (7th Cir.).<sup>2</sup>

When a defendant is subject to joint-and-several liability for a restitution award, the judgment will often exceed that particular defendant's own illicit gain. As long as the total award is tied to the *collective* gain of the defendants, however, it cannot correctly be viewed as being measured by the amount of consumers' losses. The decision below therefore does not conflict with the court of appeals decisions on which petitioner relies (see Pet. 16-20), which stand only for the general principle that the amount of restitution awarded under Section 13(b) and some other federal statutes must be measured by the defendant's gain rather than by the victims' loss.

2. Petitioner contends (Pet. 22-25) that he was entitled to a jury trial because the imposition of joint-and-several liability in excess of his own illicit gains

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<sup>2</sup> Courts of appeals have similarly upheld orders imposing joint-and-several liability for disgorgement in SEC enforcement actions, where courts exercise the same type of equitable authority granted by Section 13(b) and discussed in *Porter*. See *SEC v. Whittemore*, 659 F.3d 1, 9 (D.C. Cir. 2011), cert. denied, 133 S. Ct. 28 (2012); *SEC v. AbsoluteFuture.com*, 393 F.3d 94, 96-97 (2d Cir. 2004); *SEC v. Calvo*, 378 F.3d 1211, 1215 (11th Cir. 2004); *SEC v. Hughes Capital Corp.*, 124 F.3d 449, 455 (3d Cir. 1997).

was legal relief that triggered application of the Seventh Amendment. That argument lacks merit and does not warrant this Court's review.

a. The Seventh Amendment entitles a party to “a jury trial on the merits in those actions that are analogous to ‘Suits at common law’” at the time of the amendment’s adoption. *Tull v. United States*, 481 U.S. 412, 417 (1987). Cases analogous to those tried in courts of equity do not require a jury trial. *Ibid.* In order “[t]o determine whether a statutory action is more similar to cases that were tried in courts of law than to suits tried in courts of equity,” a court must “compare the statutory action to the 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity” and then “examine the remedy sought and determine whether it is legal or equitable in nature.” *Id.* at 417-418.

As explained above, an FTC enforcement lawsuit under Section 13(b) of the FTC Act, 15 U.S.C. 53(b), to enjoin unfair or deceptive practices is analogous to a suit tried in courts of equity, and each form of relief a court is empowered to grant pursuant to Section 13(b) is equitable relief. “Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief.” *Porter*, 328 U.S. at 399. Consistent with that recognition, the Court in *Tull* noted that a court in equity could “award monetary restitution as an adjunct to injunctive relief.” 481 U.S. at 424. The Court has likewise held that not all monetary awards are legal relief triggering application of the Seventh Amendment, and it has “characterized damages as equitable” for Seventh Amendment purposes “where



they are restitutionary, such as in ‘action[s] for disgorgement of improper profits.’” *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990) (quoting *Tull*, 481 U.S. at 424). Because the award of restitution in this case was well within courts’ traditional equitable authority, the Seventh Amendment’s jury-trial right does not apply.

b. Petitioner is also wrong in arguing (Pet. 23-25) that the decision below conflicts with decisions of other courts of appeals on the Seventh Amendment issue. As explained above, the court of appeals held that petitioner and his co-defendants could be held jointly and severally liable for illicit gains that the co-defendants received, even though those gains exceeded the amount that petitioner himself obtained through the unlawful conduct. Petitioner does not identify any court of appeals decision that has held the Seventh Amendment jury-trial right to be applicable to a Section 13(b) case where restitution was calculated in that manner. Petitioner identifies (Pet. 23-24) several courts of appeals decisions holding that the question whether the Seventh Amendment jury right applies turns on whether legal or equitable rights are at stake. But nothing in the decision below conflicts with that basic proposition.

**CONCLUSION**

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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NOVEMBER 2016